PUBLISHER'S NOTE :

ORIGINAL PAGINATION IS NOT CONTINUOUS.

(2)

Supreme Court, U.S.
FILED

952040 MAY 7 1996

OFFICE OF THE CLERK

No. 96-

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

****

TSENG FU LIN, d/b/a
ORIENTAL JADE RESTAURANT,

Petitioner

v.

CITY OF GOLDSBORO, FLOYD
McKEEL, Agent, and CHARLES R. SOUTHERLAND,

Respondents

On Petition For A Writ Of Certiorari
To The North Carolina Court of Appeals

****

APPENDIX

****

Robert E. Fuller, Jr., Esquire
Counsel of Record
109 North William Street, Suite 4
Goldsboro, North Carolina 27530
(919) 735-7496
Attorney for Petitioner

May 6, 1996

106pp

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STATE OF NORTH CAROLINA	IN THE GENERAL COUNTY OF JUSTICE SUPERIOR COURT DIVISION
COUNTY OF WAYNE	FILE NO. 94 CVS 860
TSENG FU LIN d/b/a ORIENTAL JADE RESTAURANT	TRANSCRIPT
VS	OF THE
CITY OF GOLDSBORO, FLOYD McKEEL AND CHARLES SOUTHERLAND	MOTION

APPEARANCES

PLAINTIFF: ROBERT FULLER
Attorney at Law
Goldsboro, NC

DEFENDANT: ASH SMITH
Attorney at Law
Goldsboro, NC

This matter came on for trial before the Honorable Russell Lanier, Jr., Superior Court Judge Presiding at the January 30, 1995 Civil Session of Superior Court for Wayne County, North Carolina.

The following proceedings were had, to wit:

THE COURT: Okay. This is defendant's motion for summary judgment and you say the appeal was dismissed?

MR. FULLER: Your Honor, I filed it with Mrs. Crumpler this morning. I have not had a chance to serve it --

THE COURT: Okay.

MR. FULLER: -- upon Mr. Smith.

THE COURT: Okay. So what are we here to hear?

MR. SMITH: Your Honor, we have, we also filed a motion for sanctions as a part of that motion to dismiss the appeal and we have a motion for summary judgment and I can just proceed with the motion for summary judgment and just address the issue of --

THE COURT: Okay. Well now, if the appeal has been dismissed, what jurisdiction do I have over anything else?

MR. SMITH: It was an appeal from a preliminary injunction, Your Honor. So the case is not, the case in chief has not been disposed of by trial or prior summary judgment motions, Your Honor.

THE COURT: Okay. Well, what are we talking about?

MR. SMITH: Your Honor, this, the plaintiff Mr. Lin owns a restaurant at 2102 North 117 Bypass entitled the Oriental jade Restaurant and the facts reveal that on

September 20, 1991 and March 24, 1993, city sewer crews responded to the sewer line in the vicinity of the Oriental Jade and cleared out the backed up sewer, clogged up with grease contaminating people down stream. Oriental Jade is the first customer on the sewer line at that point and grease was right at the junction of the pipe coming into the main line. There was nobody down man from him so the grease had to come from his restaurant. By letter dated March 31, 1992 from John Hast (? Spelling), the mechanical inspector with the City of Goldsboro, he notified Mr. Lin that he was going to have to install a grease interceptor. Sometime after March 31st there was a fire at the Oriental Jade. It was closed for repairs. A fire damaged the building. They could not have a water permit but temporary water permit was issued for the purpose of repairs. The members of the City Inspections Department kept going by the building because they were going to have to approve it for repairs to be released. As part of that they kept checking on the grease interceptor. It was never installed. They kept verbally advising. By certified letter dated December 3, 1993, Chief Building Inspector notified Mr. Lin again he was going to have to install a grease interceptor. Both of those letters are attached to the defendant's answer as Exhibits A and B. Mr. Lin did not install the grease

interceptor so by letter dated December 15, 1993 Mr. McKeel, Chief Building Inspector at the time who has since retired and is named defendant in this action, Your Honor, notified Mr. Lin that water service to his business was being terminated. It was only a temporary permit for purposes of repair and that permanent water would not be authorized until the interceptor was installed. So Mr. McKeel did not order the closing of his business as alleged in the complaint. It was not, you know, it was not open for business at the time. It was closed for repairs, Your Honor.

THE COURT: Okay.

MR. SMITH: Mr. Lin filed this suit April 20, 1994 alleging that his right to due process had been violated. Basically, Your Honor, that Mr. McKeel, that's paragraph 8 of the complaint, had ordered the closing of his business without notice and opportunity to be heard. We, of course, answered and denied that and maintain our two letters A and B were notice. Mr. Lin asked for preliminary injunction. That was denied. He gave notice of appeal. The appeal was never perfected and Mr. Lin, Judge, subsequently installed the grease interceptor. We granted him a water permit. He is now open for business, Your Honor. The appeal is technically moot but no one, the appeal was not withdrawn and not perfected. If I

could approach I have a case called Higgins vs. Town of China Grove and I have the statute and code of ordinances if I could approach.

THE COURT: Familiar with the case. As a matter of fact approach the bench.

Discussion at the bench.

MR. SMITH: Your Honor, the motions filed were to dismiss the appeal, more for sanctions because of the time that the attorney for City engaged in researching and preparing the motion. I filed an affidavit showing the amount of time specifically addressed to just filing the motion, Your Honor, and Mr. Fuller has stated he has filed a dismissal of the appeal. I have not seen a copy of that yet, Your Honor.

THE COURT: It is here.

MR. SMITH: Given the facts of Higgins vs. China Grove, we would, you known, ask that the Court in accepting Mr. Fuller's dismissal award the City damages as sanctions for time spent preparing for the motion to dismiss appeal, Your Honor, and turning to the motion for summary judgment, Your Honor, I don't believe that Mr. Lin would dispute the fact that he received those two letters. We have maintained that those provided him notice and if, I don't know if Your Honor will want to look at all of the statutes that I submitted. I submitted Section 168

section 174, 175 because that's the general ordinance making power of a city, it gives them the right to prohibit conditions detrimental to the health and safety of its citizens. Section 175, of course, is the right, the right to enforce those ordinances, the power to do so. Section 143-139 and ordinance 133-141 authorize municipalities to enforce a North Carolina building code and to maintain an inspection again for those purposes, Your Honor, and this photocopy, Your Honor, is the Section 801-4 of the North Carolina State Plumbing Code, Volume 2. 801.4 and it states, Your Honor, a grease interceptor shall be, interceptor shall be installed leading from --

THE COURT: Y'all incorporate this by reference in your order?

MR. SMITH: I mentioned it in, let's see, our fourth defense, paragraph 9 of the answer and would ask Your Honor to take judicial notice these statutes do apply, do govern the proceedings before Your Honor.

THE COURT: Okay. Now the only, what power is there in your Goldsboro Code?

MR. SMITH: That's my next, my next two things, Your Honor, and I submitted this photocopy of the

Goldsboro City Ordinances, Section 25-37 says, All water and sewer services shall be specified, as specified in the North Carolina Plumbing Code, Volume 2 and as approved by the inspector. I tried to highlight that on the copy for Your Honor. Finally, Your Honor, Section 25-35 on the facing page, no interested party shall have a claim for damage in consequence of such permit being revoked or annulled. In this case Mr. Lin's permit for temporary water for the purposes of his repairs had been completed because his repairs, except for the installation of grease interceptor, had been completed. His permit for temporary water was revoked and he had been notified for some known months that permanent water service would not be authorized until he installed the grease interceptor, Your Honor, and, Your Honor, that is our argument for summary judgment. We don't believe that there are any facts in dispute in regard to Mr. Lin getting notice. He has installed the grease interceptor now. His claim basically is that the --

THE COURT: Okay. Well, what about his opportunity to be heard, you know, due process has got two prongs. First, notice and particular opportunity to, to be heard. What -- now in Beaulaville all they do is go to the town board meeting and say what they want to. What do they do in Goldsboro?

MR. SMITH: Your Honor, there is no specific procedure under the Goldsboro Ordinance to go to anyone other than inspections department and inspections department was in constant communication with Mr. Lin for the nine months.

THE COURT: Assume somebody is disgusted with what the inspector says. Where do they go from there?

MR. SMITH: Often referred to the city manager and he will address their concern and, issue a letter.

THE COURT: I mean surely there is something that delineates what authority your inspector has and what --

MR. SMITH: Well, that, that authority I think, Your Honor, would be delineated by the State Statute 168.

THE COURT: That's not what I am talking about. I know he has the authority. What I am saying is somewhere, every time that an employee of a municipality or someone is given certain authority, there is also a check or a balance on the indiscriminate and arbitrary use of that which is by means of somebody that you go to above this guy.

MR. SMITH: Yes, Your Honor.

THE COURT: Okay. You know, all appeals, I mean is there a process for appeal of a rule of your building inspector?

MR. SMITH: No, Your Honor. I do not believe

there is.

THE COURT: Okay.

MR. SMITH: That would be the City's showing, Your Honor, in regard to the motion for summary judgment.

THE COURT: Okay.

MR. FULLER: Your Honor, may it please the Court, this gentleman, as previously stated, is owner of a business here in Goldsboro, the Oriental Jade, which is a restaurant here in town. It has been in business in the City of Goldsboro for over 18 years now and Mr. Lin here is the owner of the building. Up until the fire in which he was forced to do some restructuring there had never been any problems out there and even the letters Mr. Smith had referred to in March of '93 said by their own people, I do not know how the grease is getting through. That they are blaming this man for something that he obviously may or may not have caused but I think that again is a question of fact to be determined. Secondly, as the Court has already pointed out, this is the only so-called appeal procedure that is established in this, in apparently the Goldsboro Code of Ordinances as to how to get this remedy corrected by in fact you are in violation of the code. We would contend and our evidence would show he is not in violation of the code. He has not been in violation for eighteen years. That without the due process here that he

was given no voice or any opportunity to be heard in this matter, Your Honor. The, I think all of us are very much aware of the Constitution and the route to be heard. In this case this is the only right to be heard concerning this matter. In fact whether he was entitled to continue operating as he had in the past for the last eighteen years, if anything, Your Honor, he would have been grandfathered under any kind of ordinances that were subsequently passed at this point because he had been in business. The grease trap had been approved previously. Apparently when he opened, inspections are done, records are maintained, reports are filed and apparently at that point he was, he was, he was completely in compliance and we would content continued to be. Now a grease problem apparently developed at some point in time in that area but my client was blamed for it. Well, this is, this is a business area and other businesses are there in the area and cannot categorically say this was the only business that caused the problem.

THE COURT: Normally you can stick one of them snakes right down that sewer line it has a little camera on it and you can see the build-up of grease leading from various, you know places. Now whether they did this or not, I don't know but now my next question to you, do you contend that this is a proprietary or

governmental function, the providing of the sewage system of the City?

MR. FULLER: Your Honor, I think it is a governmental function.

THE COURT: Okay. Well they have immunity on those.

MR. FULLER: Well, Your Honor, this man's business has been affected and apparently, and apparently was, was translated from governmental function to proprietary function because of the fact they were forcing him, you know, you don't have the grease trap, no water. You are out of business and they translate it into a proprietary interest, into him, he is going to be responsible for installing the grease trap.

THE COURT: The distinction I was trying to make is a governmental function is one that's directly related to the health and welfare and service to the people. Proprietary normally is something making, say you own all the buildings and are renting them out. It appears to me this is governmental and did y'all raise an immunity?

MR. SMITH: We raised immunity issue as our first defense, Your Honor.

THE COURT: Okay.

MR. SMITH: As our second defense we raised the issue of qualified immunity for Mr. Floyd McKeel and Mr.

Charles Southerland, who were sued individually or it says as agent. They have both since retired from the City, Your Honor.

THE COURT: Okay.

MR. SMITH: And we would, as part of our answer, we move that they be dismissed. That motion is not necessarily that it be dismissed as to those two individuals. That motion is not necessarily on for today's calendar.

MR. FULLER: Your Honor, under the statute as they stand and as I understand what's going on here, there is no right to appeal. If the government says you have to do it, you have to do it and is that what you are --

THE COURT: No, what I am saying is the government has the right to establish reasonable rules and regulations for the use of governmental functions which is water, sewer, you know. The only thing that really concerns me about this is the aspect of what he does if he doesn't like what the building inspector has said. Now most people would go right straight to the town board and, you know, I think that you have a political method of handling this. I assume he has not done this. I think you have an immunity problem. You can't hurt them. I am going to have to allow his motion for summary judgment. I don't think you have anything based on immunity. Now

maybe the Court of Appeals will say something else.

MR. FULLER: Okay, Your Honor. Thank you.

STATE OF NORTH CAROLINA
COUNTY OF WAYNE

CERTIFICATE

This is to certify that the forgoing transcript is a true and accurate transcription of the proceedings taken at the January 30, 1995 Civil Session of the Superior Court, taken by me and transcribed by me personally.

Further, that this transcript was delivered to defendant's counsel by hand delivery.

This the 17th day of May, 1995.

"s/Billie Carole Grady"
Billy Carole Grady
Superior Court Reporter

N.C. Department of Environment, Health and Natural Resources
Division of Environmental Health
INSPECTION OF RESTAURANT OR
OTHER FOODHANDLING ESTABLISHMENT

SCORE: 92.5

Health Department: Wayne

Status Code: A

Identification Number: 06096010128

Date of Inspection or Change: 04/04/96

Name of Establishment: Oriental Jade

Street Address: 2102 N. William St.

City: Goldsboro

State: NC

Zip: 27530

Inspection Conducted by: Karen B. Cox

EHS I.D.#: 1183

1988: 91.5% A

1989: 92.5% A

1990: 92.5% A

1991: 90.0% A

1995: A

STATE OF NORTH CAROLINA
OFFICE OF THE GOVERNOR
RALEIGH 27603-8001

JAMES B. HUNT JR.
GOVERNOR

December9,
1993

Mr. Tseng Fu Lin
2102 North US 117 Bypass
Goldsboro, NC 27530

Dear Mr. Lin:

I'm sorry to learn your restaurant was damaged by fire. I sincerely hope you will soon be able to reopen.

A member of my staff has discussed your situation with the North Carolina Department of Insurance. It is my understanding that the DOI's Lee Hauser sent you a letter dated December 3, informing you that if the local inspection department is using the North Carolina State Building Code as the basis for requiring you to install a grease trap on your

sewer line, you should ask them to identify the requirement. The DOI can then render a decision on whether or not the local inspection department has acted appropriately.

It may be that a local ordinance is being used as the basis for requiring you to install a grease trap. Your letter was unclear on that point.

I hope this matter is resolved in a satisfactory manner.

My warmest personal regard.

Sincerely,
"s/JamesB.
Hunt Jr."

James B.
Hunt, Jr.

JBH/acp

AFFIDAVIT

NOTICE OF STATEMENTS AND INQUIRY

WHERE OF: The alleged N.C. Building Code violation without a

grease trap; UNFOUND

WHERE OF: This citizen who is being made to pay off the NAACP is resisting. Notice here given to the Honorable City Manager and City Attorney, City of Goldsboro, North Carolina.

TAKE THIS NOTICE: The alleged ground(s) of such Building code violation laid upon this citizen and property owner either, does not exist or has been eliminated, this citizen TSENG FU LIN, pursuant to North Carolina General Status 143-140, 160-139, 163-365. And NC Building Code Council, Building Code Volume 1-A, Section III, VIII, X, N.C. Department of Insurance, Engineer's Division, and Building Code Enforcement Agent Mr. Houser's interpretation of North Carolina Building

Code, the alleged grounds of Building Code violation - UNFOUND.

Your Plumbing Inspector, Department of Inspection: Order and action, "Install the grease trap or I will shut your business down."

I am contesting pursuant N.C.G.S. 160-200 (41); 160-237; 143-138 (d)(e); Hereto this Notice entering your record and make a note: ORDER has given to this citizen of no grounds stated; specified status procedure disobeyed; no document incorporated or even mentioned ACTION TAKEN: Override authorities and veto the interpretations of the ordinance from the City Attorney on November 12, the conclusion from another inspector on November 15, and an interpretation from the office of NC Building Code Enforcement Agency CAN NOT BE JUSTIFIED. The order and action is based on no legal

ground, veto and override the authorities who are making this citizen pay off the N.A.A.C.P., documented in the City Attorney's office and pending the decision from the N.C. Court of Appeals. Therefore, is RESISTING.

In publishing this Notice, this citizen obtains an affidavit from the Court of Justice and concluded within the United States' Constitutional First Amendment; the freedom of speech; The Fifth Amendment of due process and the property owner's rights deem legally sufficient to serve this Notice by the United States' Postal Service; postage paid and obtain an inquiry from the City of Goldsboro.

WHEREOF: Your Plumbing Inspector contended city authority was behind the July 15 burning of my property given in a statement on November 22, 1993: "This fire can not burn you down I will."

This citizen of North Carolina is informed that arson is a crime. Understanding that the person responsible for the July 15, 1993 who set up the fire is being charged and persecuted.

Under the fire, I demanded to know WHAT WERE THE LEGAL GROUNDS OF THE CITY AUTHORITIES WHO SENT SOMEONE TO BURN MY PROPERTY and threatens to do it again? Thus an inquiry is required.

Upon this day 1 month 12 year 93 and the best of my knowledge.

Signed,

"s/Tseng Fu Lin"

Tseng Fu Lin

2102 N. US 117 Bypass

Goldsboro, NC 27530

Sworn and subscribed

"s/Diane Morris"

Copys:

NC Governor's Office

Governor, Your Honor

NC Dept. of Justice

Attorney General, Your Honor

NC Dept. of Insurance c/o Mr. Houser

FILED: May 9, 1996, 11:20 a.m.. Wayne County, Clerk of Superior Court, Goldsboro, North Carolina

NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION

WAYNE COUNTY FILE NO.: 95-SP-169

IN THE MATTER OF THE FORECLOSURE OF THE DEED OF TRUST DATED JANUARY 2, 1990, FROM TSENG-FU LIN AND WIFE, NOTICE OF SALE WHI LIN LIN, AND KUO-TSUN, WANG AND WIFE, TSENG HSUEH-MIAN, WANG, TO JOHN W. DEES, TRUSTEE AND RECORDED IN BOOK 1251, PAGE 584, WAYNE COUNTY REGISTRY.

Under and by virtue of the power of sale contained in a certain deed of trust executed

by Tseng-Fu Lin and wife, Whi Lin Lin, and Kuo-Tsun, Wang and wife, Tseng Hsueh-Mian, Wang, and recorded in Book 1251, at Page 84, in the Wayne County Registry, North Carolina, and pursuant to the orders of the Clerk of Superior Court of Wayne County, dated august 25, 1995, and of Hon. Clifton W. Everett, Jr., Superior Court Judge, dated October 9, 1995, default having been made in the payment of the indebtedness thereby secured, and said deed of trust being by the terms thereof subject to foreclosure and request for foreclosure having been made by the holder of said indebtedness, the undersigned Trustee will offer for sale at public auction, to the highest bidder for cash, at the Courthouse door in Goldsboro, North Carolina, at 12:00 noon on May 30, 1996, the property conveyed in said deed of trust, the said lot or parcel of land situated in the

City of Goldsboro, Goldsboro Township, Wayne County, North Carolina, and more particularly described as follows:

BEGINNING at a concrete monument on the Western right of way of North William Street, said beginning point being Guy Best's most Southeastern property corner as shown by deed recorded in Deed Book 905, Page 65 in the Wayne County Registry; thence from the beginning leaving the Western right of way of North William Street with the line of the Guy Best property, N. 83° 11' 00" W. 162.40 feet to an iron stake, Guy Best's most Southwestern property corner; thence with the line of the Guy Best property, N 10° 25' 00" E. 41.00 feet to an iron stake found, Guy Best's most Northwestern property corner as shown by deed recorded in Deed Book 905, Page 65 in the Wayne County Registry; thence with

the line of the Guy Best property, N. 89° 53' 00" W. 47.50 feet to an iron stake, Guy Best's most Southwestern property corner as shown by deed recorded in Deed Book 457, Page 14 in the Wayne County Registry; thence with the line of the Guy Best property N. 00° 07' 00" E. 232.10 feet to an iron stake, Guy Best's most Northwestern property corner as shown by deed recorded in Deed Book 457, Page 14 in the Wayne County Registry; thence with the line of the Guy Best property, N. 89° 53' 00" W. 37.80 feet to an iron stake, Guy Best's most Southwestern property corner as shown be deed recorded in Deed Book 833, Page 339 in the Wayne County Registry; thence with the line of the Guy Best property, N. 4° 13' 00" E. 217.20 feet to an iron stake on the Southern right of way of U.S. Highway No. 117, Guy Best's most Northwestern property corner; thence with the

Southern right of way of U.S. Highway No. 117, N. 86° 07' 11" W. 40.19 feet to a concrete right of way monument; thence along a curve to the left (a chord), S. 72° 22' 49" W. 121.18 feet to a concrete right of way monument; thence with the Southern right of way of U.S. Highway No. 117, S. 43° 40' 36" W. 385.14 feet to a concrete right of way monument, Charles V. Marsalis' most Northwestern property corner as shown by deed recorded in Deed Book 1056, Page 51 in the Wayne County Registry; thence leaving the Eastern right of way of U.S. Highway No. 117 with and beyond the line of the property of Charles V. Marsalis, and to and with the line of the property of the City of Goldsboro, S. 40° 55' 55" E. 321.29 feet to an iron stake; thence continuing and with the line of the property of the City of Goldsboro, S. 40° 55' 55" E. 327.91 feet to an iron

stake, the most Southeastern corner of the property of the City of Goldsboro as shown by deed recorded in Deed Book 978, Page 275 in the Wayne County Registry, and B.R. Ward's most Southwestern property corner as shown by deed recorded in Deed Book 881, Page 321 in the Wayne County Registry; thence with the line of the property of B.R. Ward, N. 10° 25' 00" E. 130.24 feet to an iron stake, B.R. Ward's most Northwestern property corner; thence with the line of the property of B.R. Ward, S. 83° 11' 00" E. 199.00 feet to a concrete monument on the Western right of way of North William Street, B.R. Ward's most Northeastern property corner; thence with the Western right of way of North William Street, N. 00° 40' 00" W. 74.23 feet to an iron stake; thence continuing and with the Western right of way of North William Street, N. 00° 40' 00"

W. 51.80 feet to an iron stake; thence continuing and with said right of way, N. 00° 40' 00" W. 64.00 feet to a concrete monument on the Western right of way of North William Street, Guy Best's most Southeastern property corner as shown by deed recorded in Deed Book 905, Page 65 in the Wayne County Registry, the point of beginning containing 236,568 Square Feet or 5.431 Acres more or less.

The above land will be sold subject to 1995 taxes.

The highest bidder at the sale will be required to past a cash deposit of ten (10%) percent of the first $1,000.00 of the bid plus five (5%) percent of the excess of the bid.

DATE: May 9, 1996

"s/John W. Dees"

John W. Dees, Trustee

P.O. Drawer 8

100 N. William Street
Goldsboro, NC 27533-0008
Tele: (919) 735-8311

DEES, SMITH, POWELL, JARRETT, DEES & JONES

ATTORNEYS AT LAW

100 NORTH WILLIAM STREET

GOLDSBORO, NORTH CAROLINA 27530

FAX (919) 735-0234

TELEPHONE

(919) 735-8311

May 9, 1996

Mr. Robert E. Fuller, Jr.

Attorney at Law

P.O. Box 1121

Goldsboro, NC 27533-1121

Re: Lin Foreclosure, 95-SP-169

Dear Bob:

I advised you verbally earlier this week that I was postponing the sale set for May 15, 1996.

The sale is now set for Thursday, May 30, 1996 at 12:00 noon. A copy of the Notice of

Sale is enclosed.

Yours truly,

"s/John"

John W. Dees

Trustee

JWD:rs

Enclosure

copy: Mr. Jonathan Williams

NORTH CAROLINA IN THE

GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

WAYNE COUNTY FILE NO. 94 CVS 860

TSENG FU LIN, d/b/a

ORIENTAL JADE RESTAURANT,

Plaintiff

vs ORDER

DENYING PRELIMINARY

INJUNCTION

CITY OF GOLDSBORO, FLOYD M. McKEEL,

Agent, and CHARLES R. SOUTHERLAND,

Agent, Defendants

This matter having come on for hearing on May 26, 1994, on Plaintiff's application for Preliminary Injunction, and the Plaintiff being represented by Robert E. Fuller, Jr., and the Defendant being represented by L.

Ashley Smith, and the parties agreeing and stipulating in open Court that this Order could be signed out of session and out of district, and the Court having heard the arguments of counsel, the Court finds that the application for Plaintiff, Tseng Fu Lin d/b/a Oriental Jade Restaurant, for Preliminary Injunction should be DENIED.

NOW, THEREFORE, IT IS ORDERED ADJUDGED AND DECREED that Plaintiff's application for Preliminary Injunction be and the same is hereby denied.

ENTERED this the 26th day of May, 1994.

Signed this the 3rd day of June, 1994.

"s/James C. Spencer"

James C. Spencer

Judge Presiding

FILED: January 5, 1996 In the Office of Clerk of Supreme Court of North Carolina

No. 5P96

EIGHT-B DISTRICT

SUPREME COURT OF NORTH CAROLINA

TSENG FU LIN d/b/a	)	
ORIENTAL JADE RESTAURANT	)	
	)	
v	)	From
	)	Wayne
	)	
CITY OF GOLDSBORO, FLOYD M.	)	
McKEEL, AGENT, and CHARLES R.	)	
SOUTHERLAND, AGENT	)	

PETITION FOR DISCRETIONARY REVIEW

UNDER G.S. 7A-31

(Filed 5 January 1996)

TO THE HONORABLE SUPREME COURT OF NORTH

The Petitioner in this action, Tseng Fu Lin, Pursuant to Rule 15 of the North Carolina Rules of Appellate Procedure and N.C.G.S. Section 7A-31(c) respectfully petitions the Supreme Court of North Carolina to review the decision of North Carolina Court of Appeals filed therein on December 19, 1995, Case No. COA95-657. A copy of the opinion of North Carolina Court of Appeals is attached hereto.

The grounds of this petition are as follows:

1. This case involves legal principals of major significance to the jurisprudence of the State and Nation, and

2. The decision of the Court of Appeals appears likely to be in conflict with the decisions of the Supreme Court of North Carolina, Supreme Court of the United States and the Court of Appeals of North Carolina is

likely in error.

FACTS

This case originated as a result of the actions of the City of Goldsboro. Chief Building Inspector issuing an order to cut off the water and electricity on December 7, 1993, because of Building Code violation of not having a grease trap installed. The utility director Charles R. Southerland, cut off water at 12:00 p.m. on December 16, 1993. The City of Goldsboro provided the opportunity. Petitioner filed the underlying action for damages incurred when he was forced to close the restaurant due to being denied access to city water, and a permit to dig a well. He contended that his Constitutional Rights were violated and asked for Actual and punitive damages.

Defendants raised the affirmative

defenses of Governmental Immunity and Qualified Immunity. On November 29, 1994, defendants moved for Summary judgment which was allowed. Petitioner appealed to the North Carolina Court of Appeals by written opinion filed on December 19, 1995.

REASONS THAT CERTIFICATION SHOULD BE ISSUED

1. Legal Principles of Major Significance To The Jurisprudence Of The State And Of the Nation. A reading of the entire whole record in this case and decision of the Court of Appeals reveal that defendants exercised their Police Power in disregard of the law protecting people and liberty guaranteed to the people. Petitioner did not know what would be next. Petitioner contends that defendant, Floyd M. McKeel, was a chief building inspector and an agent acting in a role of governmental capacity with a duty of

written law to discharge in accordance with the City Code.

The petitioner contends that chief building inspector was limited to a narrow issue prescribed by the zoning ordinance and the N.C. Building Code which the city had adopted and that he should uphold the law and constitution to which he had sworn prior to taking office.

At that time, defendant McKeel knowingly issued an order to cut off the Petitioner's water and electricity.

a. He failed to obey and follow-up N.C.G.S. 160A-428, 160A-429, 160A-430 N.C. Statute Prescribed Due Process Procedure Requirements.

b. There was no exigent situation declared by State, Nation, County and City and the law and constitution were available.

c. There was not a court order pending for an action.

d. There is no water cut off subscribed appearing in City of Goldsboro ordinance except non-payment taxation.

e. The petitioner was in good standing with connection of electricity from CP&L and water service from City of Goldsboro.

Petitioner also contends defendant, Charles R. Southerland, knowingly took action that:

a. Water supply by city is for sale.

b. Petitioner is a customer and consumer.

c. Cutting off water will result in some damages to lives and property and can result in unlawful means to control business by the government toward monopoly.

d. He had not received order from his superior.

e. He did not give any written notice prior to taking this action.

The petitioner contends in this petition that water supply is essential depending heavily to the valuable service which in order to acquire, it must be willing to pay for it. Petitioner contends that he had established good standing since February, 1976.

The petitioner contends, and the records bear out, that water to drink, electricity to heat up during mid-winter (especially during Christmas) being cut off resulted in heavy damages and took its toll on the Petitioner's business.

The petitioner further contends, and the record bears out, this contention that the founding fathers at the Constitutional

Convention; i.e., delegates: the Honorable Blount, Honorable Spaight and Honorable Williamson had insisted that Bill of Rights must be in writing and adopted with our constitution within its adoption in September 17, 1787, or pull out.

The Petitioner contends, and the record bears out, that our legislators insisted freedom in writing in the First Article, freedom is first.

The building inspector claimed that petitioner violated the law and must reroute entire system, water system, and electrical system of 5.43 acres of land. This raised an issue of bankruptcy. The Inspector did not allow the petitioner to face the accuser to defend his innocence, to work out, to appeal or to beg mercy. Then a corporate executive mandated cutting off water, forgetting there

is a contract of American Dream. Petitioner contends that the city maintaining water for sale is a privately owned corporation. That once allowed to claim governmental immunity means that in its control, it can unlawfully establish a monopoly prohibited in current law.

Further and at utmost, petitioner is imploring this Honorable Supreme Court of North Carolina and Honorable Justices to come out to address this daily livelihood issue. And further to secure the blessings of liberty to ourselves and our posterity as in the Preamble. This is a legal principle of major significance to the jurisprudence of the State of the Nation, the concept of which is as follows:

a. No man is punishable or can be lawfully made to suffer in body or goods

except for a distinct breach of law established in the ordinary legal manner before the ordinary court of the land.

b. . . . No man is above the law . . . Every man is subject to the ordinary law of realm (Albert v. Dicey, Ist. Ed. pp. 188-95, Dicey Book, 1885).

2. Conflict With Decisions Of Supreme Court Of United States, Conflict With Decision Of Supreme Court Of North Carolina And Decision Of Appeals Is Likely In Error.

The decision of the Court of Appeals of North Carolina appears likely to be in conflict with the decisions of Supreme Court of United States and the Supreme Court of North Carolina, and the decision of the Court of Appeals is likely in error as authority enunciated in these case:

a. U.S. v. James Daniel Good el

Property 126 L.E.D. 2nd 490-491 (1993)

b. Lucas v. South Carolina Coastal Council 505 US 120 L.E.D. 2nd (1991)

c. Youngstown Sheet Metal el v. Sawyer 343 US 579 (1952)

d. Harlowe v. Fitzgerald (1982)

e. Moseller v. City of Ashville 147 S.E. 2nd 558, 267 NC 104.20. ALR 3rd 1286 (1966)

f. Bowling v. City of Oxford 148 S.E. 2nd 624, 267 NC 552.

Upon a reading in the Court of Appeals offering an opinion (alternated) in Lin case the basis of its decision likely an assumption that disconnection of water by governmental capacity is limited because the N.C. Building Code prescribed a duty of building inspector to use due process and just compensation according to the Fifth Amendment of the U.S.

Constitution. It is a general rule which has been enunciated in the law of the North Carolina Supreme Court in McNeill v. Harnett County, 327 NC 552, 398 S.E. 2nd 475 (1990). This stare decision is in contradiction with Moseller v. City of Ashville, 147 S.E. 2nd 558, 267 NC 104.20 A.L.R. 3rd 1286 (1966) and Bowling v. City of Oxford, 148 S.E. 2nd 624, 267 NC 552. Petitioner contends that in the McNeill case, the Supreme Court was dealing with taxation dispute, while the constitutional mandate requirement of the Fifth Amendment not been been enunciated and imposed. The Court language that addresses the statutory taking legally avoided the constitutional issue because of the presumption of constitutionality of existing law at N.C.G.S. 153-283 dealing with the standing of the taxpayer's suit. Petitioner

protests stare decision can not apply in denying his case because standing is not the issue to reach the Court of Appeals. Petitioner contends that, and records bear out, this contention at the January 30, 1995 Honorable Superior Court maintained petitioner actions in standing rejected defendants counter claim. Summary judgment that was allowed was on the basis of governmental immunity on the appeal issue. Court of Appeals Can Not Making A Finding To Replace The Trial Court. This same contention is also true at the May 25, 1995, Superior Court Order, in rejecting Motion for Dismissal. The petitioner contends that basis of his action is maintained at this issue: Inverse Condemnation Without Due Process Of Law And Just Compensation in response to a building inspector's order and actions. Petitioner

further contends that when his case reached the Superior Court, due process requirement is already imposed in N.C.G.S. 160A-428, 160A-429, 160A-430, and enunciated from U.S. Supreme Court in Lucas v. South Carolina Coastal Council, 505 U.S. 120 L.E.D. 2nd (1991) and James Daniel Good el-Property, 126 L.E.D. 2nd 490-491 (1993). The enunciatio of law imposed absolute authority requiring due process protection of Fifth Amendment of United States Constitution in an action against real property. Petitioner contends that in his case standing will sustain the assurance of a discretionary review.

ISSUE TO BE BRIEFED

In the event this Honorable Supreme Court of North Carolina allows this petition for discretionary review, Petitioner intends to present the following issues and his brief for

review:

1. Were the petitioner's constitutional rights violated when his use of property was denied when his water connection was cut off by City of Goldsboro Floyd M. McKeel, agent, and Charles R. Southerland, agent, without affording petitioner a hearing prior to such actions been taken?

2. Did the Curt err in granting the defendants' motion for summary judgment?

CONCLUSION

The Plaintiff respectfully asks the Court to consider hearing this case.

Respectfully submitted this 4th day of January, 1996.

"s/Robert E. Fuller, Jr."

Robert E. Fuller, Jr.

Attorney for the Plaintiff

State Bar No. 6158

P.O. Box 1121

Goldsboro, NC 27533-1121

(919) 735-7496

CERTIFICATE OF SERVICE

I, Robert E. Fuller, Jr., Attorney at Law, certify:

That I am and at all times hereinafter mentioned was more than eighteen (18) years of age; That on the 4th day of January, 1996, I served a copy of the foregoing Petition For Discretionary Review addressed to the following by hand delivering or mailing a copy of the same in the United States Mail, First Class, Postage prepaid addressed to:

W. Harrell Everett, Jr.
Attorney for Defendants
P.O. Drawer 10809
Goldsboro, NC 27532-0809

Stacey L. Fuller
Attorney for Defendants
P.O. Drawer 10809
Goldsboro, NC 27532-0809

I certify under penalty of perjury that the foregoing is true and correct.

This the 4th day of January, 1996.

"s/Robert E. Fuller, Jr."

Robert E. Fuller, Jr.
Attorney for the Plaintiff
State Bar No.: 6158
P.O. Box 1121
Goldsboro, NC 27533-1121
(919) 735-7496

Office of the Clerk
North Carolina Court of Appeals
John H. Connell, Clerk
P.O. Box 2779
Raleigh, North Carolina 27602
Telephone (919) 733-3561

23 January 1996

Honorable David B. Brantley
Clerk Superior Court
Wayne County
Goldsboro, NC Box 01-12-10

Re: Tseng Fu Lin v Goldsboro, et al
COA95-657
94CVS860

Dear Mr. Brantley:

Please be advised that we have prepared a certified copy of the record in the above referenced case and delivered same to the Clerk of the Supreme Court of North Carolina.

Sincerely yours,

"s/Kathy Taylor"

Deputy Clerk

Court of Appeals

CSC Orig

cc: Mr. Robert E. Fuller

FILED: February 22, 1996, 4:39 p.m., In the Office of Clerk Court Of Appeals Of North Carolina

No: COA95-657

EIGHT-B DISTRICT

NORTH CAROLINA COURT OF APPEALS

TSEUNG FU LIN d/b/a ORIENTAL JADE RESTAURANT	)	From Wayne
	)	94CVS860
V	)	
CITY OF GOLDSBORO, FLOYD McKEEL, Agent, and CHARLES R. SOUTHERLAND, Defendants	)	

ORDER

Petition for Discretionary Review to review the decision of the North Carolina Court of Appeals filed on the 19th day of

December 1995 was denied by order of the North Carolina Supreme Court of Appeals;

IT IS THEREFORE CERTIFIED to the Clerk of Superior Court Wayne County North Carolina that the North Carolina Supreme Court has denied the Petition for Discretionary Review filed by the Plaintiff in this cause.

WITNESS my hand and official seal this the 22nd day of February 1996.

"s/John H. Connell"

John H. Connell

Clerk, North Carolina Court of Appeals

"s/Kathy Taylor"

Deputy Clerk, North Carolina Court of Appeals

Orig. to CSC

Copy to:

Mr. Robert E. Fuller, Jr., Attorney at Law,

For Tseng Fu Lin

Mr. W, Harrell Everett, Jr., Attorney at Law,

For Goldsboro, et al

Ms. Stacey L. Fuller

No. 5P96

EIGHT-B DISTRICT

SUPREME COURT OF NORTH CAROLINA

TSENG FU LIN d/b/a ORIENTAL JADE RESTAURANT)
From NC Court of Appeals)
)
v)
(From Wayne COA 95-657))
)
CITY OF GOLDSBORO, FLOYD M. McKEEL, AGENT,)
(94CVS860)
and CHARLES R. SOUTHERLAND, AGENT)

ORDER

Upon consideration of the petition filed by Plaintiff in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of

Appeals:

"Denied by order of the Court in conference, this the 8th day of February 1996.

s/Orr, J.

For the Court"

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 14th day of February 1996.

Christie Speir Cameron

Clerk, Supreme Court of North Carolina

"s/Marvea J. Francis"

Marvea J. Francis"

Assistant Clerk

Copy to:

North Carolina Court of Appeals

Mr. Robert E. Fuller, Jr., Attorney at Law, For Fu Lin

Mr. W. Harrell Everett, Jr., Attorney at Law,

For City of Goldsboro et al

Mr. Stacey L. Fuller, Attorney at Law, For City of Goldsboro

Mr. Ralph A. White, Appellate Court Reporter

West Publishing Company

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FILED: December 19, 1995, 8:07 a.m., Clerk of Court of Appeals, North Carolina

COA95-657

NORTH CAROLINA COURT OF APPEALS

Filed: 19 December 1995

TSENG FU LIN d/b/a
ORIENTAL JADE RESTAURANT,
Plaintiff

v. Wayne County

No. 94 CVS 860

CITY OF GOLDSBORO, FLOYD M. McKEEL, AGENT, and

CHARLES R. SOUTHERLAND, AGENT,

Defendants

Appeal by Plaintiff from summary judgment order entered 30 January 1995 by Judge Russell Lanier, Jr., in Wayne County Superior Court. Heard in the Court of Appeals 18 December 1995.

Robert E. Fuller, Jr., for plaintiff-appellant.

Everett, Womble, Finan & Riddle, by W. Harrell Everett, Jr., and Stacey L. Fuller, for defendant/appellees.

WYNN, Judge.

The following evidence was presented pursuant to a hearing held on defendants' motion for summary judgment and for sanctions: On 20 September 1991 and again on 24 March 1993, defendant City of Goldsboro (hereinafter "City") dispatched work crews to clean out a

section of sanitary sewer pipe in the vicinity of a restaurant owned by plaintiff. The crews on both occasions discovered the sewer main was clogged with large amounts of grease which had contaminated the plumbing of users farther down the line. John Hales, the City Inspector for the sewer system, determined that the source of the grease causing the blockage was plaintiff's restaurant. By letter dated 31 March 1993, Mr. Hales informed plaintiff that he was required to install a grease interceptor to protect the sewer main.

Sometime after 31 March 1993, a fire at plaintiff's restaurant required its closing for repairs. During the period of repair, plaintiff obtained a temporary water permit; however, City inspectors verbally advised him on several occasions that the grease interceptor needed to be installed before

permanent water service would be permitted.

By certified letter dated 3 December 1993, Chief City Inspector Floyd McKeel again notified plaintiff that he could not qualify for permanent water service until the grease interceptor was installed. Plaintiff failed to comply with the notifications for a period of nine months; consequently, on 15 December 1993, he was notified by certified letter that his permit to connect with the City water lines was revoked effective 16 December 1993. Plaintiff subsequently installed the grease interceptor and was reconnected to the water line.

Plaintiff instituted the underlying action for damages incurred when he was forced to close his restaurant due to being denied access to the City water lines. He contended that he was not provided with either notice or

an opportunity to be heard, and asked for actual and punitive damages. Defendants answered maintaining that the City and its agents acted in compliance with City Ordinances, and that adequate notice to plaintiff had been provided. Defendants further raised the affirmative defenses of governmental immunity and qualified immunity. On 29 November 1994, defendants moved for summary judgment and sanctions. By order dated 30 January 1995, defendants' motion for summary judgment was allowed. Plaintiff appealed.

We note at the outset that plaintiff has failed to follow each question presented with a reference to the assignments of error pertinent to the question as required by N.C.R. App. P. 28(b) (5). Arguments so

presented are deemed abandoned. Nevertheless, pursuant to the authority granted us by N.C.R. App. P. 2, we will address the issue raised by plaintiff on appeal.

Plaintiff contends that the trial court erred in granting summary judgment in favor of defendants because the City Ordinances under which he was denied water are unconstitutional. He maintains that the ordinances do not provide for an opportunity to be heard when a citizen is excluded from City services; therefore, his due process rights have been violated. We disagree.

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled

to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (1990). The movant can meet this burden in one of two ways: (1) by showing that an essential element of the opposing party's claim is nonexistent; or (2) demonstrating that the opposing party cannot produce evidence sufficient to support an essential element of the claim or overcome an affirmative defense which would work to bar his claim. Roumillat v. Simplistic Enterprises, Inc., 331 N.C. 57, 63, 414 S.E. 2d 339, 342 (1992).

In the instant case, defendants offered evidence that an essential element of the claim was nonexistent, as well as demonstrating the existence of an insurmountable affirmative defense. The record indicates that the trial court granted summary judgment on the basis of governmental

immunity. "Absent a statute imposing liability, cities 'acting in the exercise of police power, or judicial, discretionary, or legislative authority, conferred by their charters or by statute, and when discharging a duty imposed solely for the public benefit . . . are not liable for the tortious acts of their officers or agents.'" Lonon v. Talbert, 103 N.C. App. 686, 691, 407 S.E. 2d 276, 280 (1991) (quoting Hamiliton v. Hamlet, 238 N.C. 741, 742, 78 S.E. 2d 770, 771 (1953)).

Goldsboro City Ordinance § 25-37 provides that "all water and sewer service lines shall be as specified in North Carolina Plumbing Code, Volume 2, and as approved by the Plumbing Inspector." The North Carolina Plumbing Code, Volume 2, Ch. 8, § 801.4 provides in pertinent part:

> A grease interceptor shall be installed at the waste line leading from sinks, drains or other fixtures in the

following establishments when, in the opinion of the Plumbing Official, a hazard exists: restaurants, hotel kitchens or bars . . . or other uses where grease can be introduced into the drainage systems in quantities that can affect line stoppage or hinder sewage disposal.

The above language clearly supplies the legislative authority necessary to support the actions of defendants' agents, and to permit the application of the affirmative defense of governmental immunity in this case. For this reason, we can find no error by the trial court in awarding summary judgment on this ground.

We next address plaintiff's contention that the ordinance permitting the action taken by defendants' agents violated his constitutional rights to due process. We find out Supreme Court's decision in McNeill v. Harnett County, 327 N.C. 552, 398 S.E. 2d 475 (1990) controlling on this issue. In McNeill,

the appellants contended that the termination of water services without notice or opportunity for a hearing violated their right to due process. The Court held as follows:

> For the [appellants] to prevail on the basis of lack of notice and an opportunity to be heard, they must establish a property interest or entitlement to the water services. North Carolina law controls the existence or nonexistence of an entitlement. We hold that the water service furnished by the County here does not rise to the level of "property" protected by due process requirements. While other statutes specifically authorize disconnections in certain situations, N.C.G.S. § 153A-283 states specifically that '[i]n no case may a county be held liable for damages for failure to furnish water or sewer services.' In light of this statutory provision, a citizen of a county in North Carolina may not assert a claim of entitlement to water services.

McNeill, 327 N.C. at 571, 398 S.E. 2d at 485-86 (citations omitted).

Accordingly, plaintiff in this case had no property interest in the water service supplied by defendants, therefore he may not claim a violation of due process rights.

The McNeill Court went on to discuss the fact that even if a property interest did exist, sufficient notice was given in that case to protect the appellants from "erroneous or arbitrary withholding of essential services." Id. at 571-72, 398 S.E. 2d at 486, (quoting Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 18, 56 L. Ed. 2d 30, 44 (1978(, citing Mathews v. Eldridge, 424 U.S. 319, 47 L. Ed. 2d 18 (1976)). In the instant case, plaintiff was given numerous written and verbal notifications of the required grease interceptor over a period of nine months prior to the discontinuation of services. As such, plaintiff received sufficient notice to afford adequate protection from the arbitrary withholding of water services from his restaurant. Therefore, assuming arguendo that plaintiff had a property interest in the water

services, we can discern no infringement on his right to due process.

For these reasons, we find no error by the trial court and we affirm the order granting summary judgment in favor of defendants.

Affirmed.

Judges EAGLES and SMITH concur.

Report per Rule 30(e).

A True Copy
Clerk of the Court of Appeals of North Carolina
BY "s/Scoggins"
Deputy Clerk
December 19, 1995

NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
WAYNE COUNTY 94 CVS
TSENG FU LIN d/b/a ORIENTAL
JADE RESTAURANT,
Plaintiff

vs.

MOTION FOR
PRELIMINARY
INJUNCTION

CITY OF GOLDSBORO, FLOYD M. McKEEL, agent,
and CHARLES R. SOUTHERLAND, agent,
Defendant(s)

Plaintiff, pursuant to N.C.G.S. § 1-485, moves the Court to issue a preliminary injunction enjoining Defendant from cutting off the water and lights from the Plaintiff's business establishment. In support of this motion, Plaintiff submits the affidavit of TSENG FU LIN, which is attached as exhibit "A", stating that Defendant has taken the following actions in violation of Plaintiff's rights:

1. Turning off the Plaintiff's utilities

without affording Plaintiff a hearing prior to such action.

2. Causing the Plaintiff to shut down his business and to incur economic loss due to his inability to operate a restaurant without lights and water.

WHEREFORE, Plaintiff prays the Court that Defendant be preliminarily enjoined from cutting off the Plaintiff's utilities and that Defendant be ordered to turn Plaintiff's utilities on.

This the 18th day of April, 1994.

"s/Robert E. Fuller, Jr."

Robert E. Fuller, Jr.
Attorney for Plaintiff
NC Bar No. 6158
P.O. Box 1121
Goldsboro, NC 27533-1121
(919) 735-7496

CIVIL SUMMONS

STATE OF NORTH CAROLINA

WAYNE COUNTY

FILE NO. 94 CVS 860

SUPERIOR COURT DIVISION

PLAINTIFF: TSENG FU LIN d/b/a ORIENTAL JADE RESTAURANT

2102 N. 117 BYPASS

GOLDSBORO, NC 27530

VS.

DEFENDANT: CITY OF GOLDSBORO, FLOYD M. McKEEL, agent and CHARLES R. SOUTHERLAND, agent

CITY HALL

CENTER STREET

GOLDSBORO, NC 27530

PLAINTIFF'S ATTORNEY: ROBERT E. FULLER, JR.

P.O. BOX 1121

GOLDSBORO, NC 27533-1121

(919) 735-7496

DATE ISSUED: APRIL 20, 1994

TIME ISSUED: 9:42 a.m.

"s/Nora Aycock"

Deputy CSC

FILED: April 20, 1994, 9:42 a.m., Wayne County Clerk of Superior Court, Goldsboro, North Carolina

NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

WAYNE COUNTY FILE NO.: CVS 860

TSENG FU LIN d/b/a ORIENTAL JADE RESTAURANT,

Plaintiff,

vs. COMPLAINT

CITY OF GOLDSBORO, FLOYD M. McKEEL, agent, and CHARLES R. SOUTHERLAND, agent,

Defendant(s)

The Plaintiff, Tseng Fu Lin, complaining of the Defendant, alleges and says:

1. That the Plaintiff is a citizen and resident of Wayne County, North Carolina.

2. That the Plaintiff is the licensed owner and manager of the Oriental Gourmet,

Inc. and the Oriental Jade Restaurant located in Goldsboro, Wayne County. North Carolina.

3. That the said business was incorporated in the State of North Carolina on February 1, 1976.

4. That the Defendant, based upon information and belief, is a municipal corporation existing under the laws of the State of North Carolina and possessing the power, duties and authority vested in it by the General Assembly of North Carolina, including the power of building inspection.

5. That based upon information and belief, the Building Inspection Departments of the City of Goldsboro is under the supervision of the North Carolina Department of Insurance.

6. That based upon information and belief, Floyd McKeel is an agent of the Defendant in that he is the Chief Building

Inspector.

7. That based upon information and belief, Charles R. Southerland is an agent of the Defendant in that he is the Utilities Director.

8. That the Defendant, Floyd McKeel, ordered the closing of the Plaintiff's business for building code violations on December 15, 1993 without providing the Plaintiff with notice or an opportunity to be heard.

9. That the Defendant, Charles R. Southerland, shut off the utilities at the Plaintiff's business without providing the Plaintiff with notice or an opportunity to be heard.

10. that the Plaintiff has suffered substantial economic loss as a result of the actions of the Defendant.

WHEREFORE, the Plaintiff prays the Court that:

1. He have and recover the sum of $100,870.30 for his economic losses dating back to December 15, 1993.

2. He have and recover punitive damages from the Defendant.

2. The Defendant be ordered to turn on the utilities at the Plaintiff's business.

3. He have and recover the costs of this action including reasonable attorney's fees in the bringing of this action.

4. For such other and further relief as to the Court may seem just and proper.

This 18th day of April, 1994.

"s/Robert E. Fuller, Jr."

Robert E. Fuller, Jr.

Attorney for the Plaintiff

State Bar # 6158

P.O. Box 1121

Goldsboro, N.C. 27533-1121

(919) 735-7496

NORTH CAROLINA COURT OF APPEALS

TSENG FU LIN d/b/a ORIENTAL JADE RESTAURANT, Plaintiff	)
	) From Wayne County
v.	) No. 94 CVS 860
CITY OF GOLDSBORO, FLOYD M. McKEEL, AGENT, and CHARLES R. SOUTHERLAND, AGENT, Defendants	)

ORGANIZATION OF TRIAL TRIBUNAL

Plaintiff appeals from the Order entered by the Honorable Russell J. Lanier, Jr., at the January 30, 1995 term of Civil Superior Court, Wayne County, North Carolina. (Record filed C.A. June 19, 1995, and docketed C.A. July 13, 1995).

City of Goldsboro

P.O. Drawer A

North Carolina

27533-9701

(919) 735-6121

Certification No. P364 761820

March 31, 1993

Oriental Jade Restaurant

2102 N. Highway 117 Bypass

Goldsboro, NC 27530

Dear Sir(s);

Thank you for the time you took to discuss the grease problem at your restaurant. AS I told you at the time of our discussion, this is the second time in two years that our sanitation department has had to clean out a large section of sewer pipe where your building connects to our sewer main.

I do not know how the grease is getting

through, but the fact is that it is getting through. Therefore, I must insist that you obtain a licensed plumber to install a grease trap that will be of sufficient size and gallon per minute to protect our sewer. The fixtures that will need to be put on the grease trap must include: the dishwasher, the pots and pan sink, and floor drains that might receive wash down from the cooking area and the can wash.

As is customary, we will allow you thirty (30) days from the date of receipt of this letter to get the equipment installed. It is hoped that you will comply with this letter and further action can be avoided.

If I can be of further assistance, please do not hesitate to contact me by calling 580--389. My office hours are from 8:00 a.m. - 9:30 a.m. and from 4:00 p.m. - 5:00 p.m.

Monday through Friday.

Yours truly,

"s/John N. Hales"

John N. Hales

Plumbing/Mechanical Inspector

JNH:gf

cc: Floyd McKeel, Chief Inspector

City of Goldsboro
P.O. Drawer A
North Carolina
27533-9701
(919) 735-6121

December 3, 1993

Certification No. P375 015124

Mr. Tseng Fu Lin
Oriental Jade Restaurant
2102 N. Highway 117 Bypass
Goldsboro, NC 27530

Dear Mr. Lin:

The City Manager has asked that I write you concerning the reasons the Inspections Division of the City of Goldsboro has required that a grease interceptor be installed at your restaurant located at 2102 North Highway 117 Bypass.

I refer you to a certified letter dated

March 31, 1993 from John Hales, Plumbing/Mechanical Inspector for the City of Goldsboro, a copy of which is attached hereto. I believe this letter fully explains the Inspections Division's position concerning installation of a grease interceptor.

If I may summarize, the City's Maintenance Division has been called to your restaurant on two occasions in order to clean out a section of sanitary sewer pipe which was clogged with grease.

Since your restaurant is the first customer connected to the sanitary sewer main, the origin of the grease can only be attributed to your facility. In March, 1993, the Inspections Division requested that a licensed plumber install a grease interceptor of sufficient size and gallons per minute in order to protect the City of Goldsboro's

sanitary sewer system. You were subsequently granted 30 days from the date of receipt of the March 31, 1993 letter in order to comply with this directive.

As of this date, a grease interceptor has not been installed at the Oriental Jade Restaurant. The City of Goldsboro has the authority under the North Carolina State Plumbing Code to mandate this requirement. I refer to Chapter 8, Section 801-4 entitled "Grease Interceptors" of the State Plumbing Code which states, in part, that:

"A grease interceptor shall be installed in the waste line leading from sinks, drains or other fixtures in the following establishments when, in the opinion of the Plumbing Official, a hazard exists: restaurants, hotel kitchens or bars, factory cafeterias or restaurants, clubs, or other

uses where grease can be introduced into the drainage system in quantities that can affect line stoppage or hinder sewage disposal."

The City of Goldsboro has performed a considerable amount of maintenance on the sanitary sewer line coming into your establishment. I must advise you that, until such time a grease interceptor is installed at this location in compliance with the State Plumbing Code, authorization will not be forthcoming for permission to connect to water, sanitary sewer or electrical service. The system that currently exists at this restaurant is not achieving its intended purpose. A grease interceptor must be installed in order to meet City sanitary sewer standards.

I am asking for your cooperation in this matter. If you have any questions or if I can

be of assistance, you may contact me at 580-4346.

Your truly,

"s/Floyd McKeel"

Floyd McKeel

Chief Inspector

FM/RMS/ssj

Attachment

City of Goldsboro
P.O. Drawer A
North Carolina
27533-9701
(919) 735-6121

December 15, 1993

Tseng Fu Lin
2102 N. US Highway 117 Bypass
Goldsboro, NC 27530

Dear Mr. Lin:

This letter is to advise you that failure on your part to install a grease trap at your restaurant, known as Oriental Jade, located at the above mentioned address, by 12:00 p.m. Thursday, December 16, 1993, this office will have no alternative but to have your water service disconnected.

You have been given ample opportunity to meet the requirements of the State Building

Code and the City Ordinance requiring you to have a grease trap installed. The first notice was mailed to you in March 31, 1993. You have not, as of this date, complied with our request. Therefore, failure on your part to comply with this notice will result in the water service being terminated.

Asking for your cooperation in this matter. If you have any questions, please contact me by calling 580-4346.

Sincerely,

"s/Floyd McKeel"

Floyd McKeel

Chief Inspector

FM: (no signature)

Aknowledgment of Receival

Mr. Tseng Lin or Authorized Representative

"s/R.D. Roscoe"

Officer, Goldsboro Police Dept.

12/15/93 11:12 a.m.

Date and Time of Delivery

FILED: February 6, 1995, 12:38 p.m., Wayne County Clerk of Superior Court, Goldsboro, North Carolina

NORTH CAROLINA COURT OF APPEALS

TSENG FU LIN	)	
ORIENTAL JADE RESTAURANT	)	
	)	
v.	)	From
	)	Wayne County
	)	No.94 CVD 860
CITY OF GOLDSBORO, FLOYD M.	)	
McKEEL, Agent, and CHARLES	)	
R. SOUTHERLAND, Agent	)	

NOTICE OF APPEAL

TO THE HONORABLE COURT OF APPEALS OF NORTH CAROLINA:

Plaintiff, Tseng Fu Lin d/b/a Oriental Jade Restaurant, hereby gives Notice of Appeal to the Court of Appeals of North Carolina from the order entered on January 30, 1995, in the Superior Court of Wayne County, which granted the Defendants' Motion for Summary

Judgment.

Respectfully submitted this the 6th day of February, 1995.

ROBERT E. FULLER, JR.

BY "s/Robert E. Fuller, JR."

Robert E. Fuller, Jr.

Attorney for Defendant/Appellant

N.C. State Bar # 6158

P.O. Box 1121

Goldsboro, NC 27533-1121

(919) 735-7496

FILED: June 7, 1995, 2:46 p.m., Wayne County Clerk of Superior Court, Goldsboro, North Carolina

NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

WAYNE COUNTY FILE NO.: 94 CVS 860

TSENG FU LIN, d/b/a
ORIENTAL JADE RESTAURANT,

Plaintiff

vs. ORDER

CITY OF GOLDSBORO, FLOYD M.McKEEL, Agent, and CHARLES R. SOUTHERLAND,

Defendants

THIS MATTER, coming on to be heard and being heard before the undersigned Superior Court Judge, sitting at the May 22, 1995, Term of Wayne County Superior Court, the same being a mixed session, upon the motion of the

Defendant for Dismiss Appeal and for Sanctions; and the Court, after hearing the arguments of counsel and the pleadings, allows the Plaintiff until May 26, 1995, at 5:00 p.m. to serve on the Defendant's attorney the Record on Appeal at which time the Defendant's attorney will withdraw their motion.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Plaintiff's attorney shall have until May 26, 1995, at 5:00 p.m. to serve on the Defendant's attorney the Record on Appeal at which time the Defendant's attorney will withdraw their motion.

Entered this 22nd day of May, 1995

Signed this 2nd day of June, 1995.

"s/W. Osmond Smith"

OSMOND SMITH

Judge Presiding

ASSIGNMENT OF ERROR

Defendant assigns as error:

The Court's granting the Defendant's Motion for Summary Judgment as there were genuine issues of fact to be decided in this case.

Exception # 1, Transcript page 12.

CERTIFICATE OF SERVICE OF PROPOSED RECORD ON APPEAL

This is to certify that the undersigned has this date served W. Harrell Everett, Jr. Attorney for Defendant/Appellant, with a copy of the foregoing Proposed Record on Appeal by hand delivering the same to his office, in the manner prescribed by Rule 5 of the Rules of Civil Procedure, as follows:

W. Harrell Everett, Jr.
Everett, Womble, Finan and Riddle
507-B N. Spence Avenue
Goldsboro, NC 27532

This the 25th day of May, 1995.

"s/Robert E. Fuller, Jr."
Robert E. Fuller, Jr.
Attorney for Plaintiff/Appellee
P.O. Box 1121

Goldsboro, NC 27530

(919) 735-7496

SETTLEMENT OF RECORD ON APPEAL

This is to certify that the Proposed Record on Appeal served on W. Harrell Everett, Jr. the 25th day of May, 1995, shall constitute the Record on Appeal in this matter, by stipulation of counsel.

This the 25th day of May, 1995.

"s/Robert E. Fuller, Jr."

"s/W. Harrell Everett, Jr."

Robert E. Fuller, Jr.

W. Harrell Everett, Jr.

Attorney for Plaintiff/Appelle

Attorney for Defendant/Appellant

NAMES AND ADDRESSES OF COUNSEL

W. Harrell Everett, Jr.
Everett, Womble, Finan and Riddle
Attorney for Defendant/Appellant
P.O. Box 10809
507-B N. Spence Avenue
Goldsboro, NC 27532-0809
(919) 778-6707

Robert E. Fuller, Jr.
Law Office of Robert E. Fuller, Jr.
Attorneys for Plaintiff/Appellee
P.O. Box 1121
109 N. William Street
Goldsboro, NC 27533-1121
(919) 735-7496

CERTIFICATE OF SERVICE OF RECORD ON APPEAL

This is to certify that the undersigned has this date served W. Harrell Everett, Jr., Attorney for Defendant/Appellee, with a copy of the foregoing Record on Appeal by hand delivering the same to his office, in the manner proscribed by Rule 5 of the Rules of Cilvil Procedure, as follows:

W. Harrell Everett, Jr.
Everett, Womble, Finan and Riddle
Attorney for Defendant/Appellee
P.O. Drawer 10809
507-B N. Spence Avenue
Goldsboro, NC 27532-0809
(919) 778-6707

Counsel for both parties further stipulate to the inclusion of copies of the Motion to Dismiss Appeal dated March 7, 1995, and the Response to said Motion filed March

30, 1995, may be used on this Record on Appeal, and further stipulate that the unsigned copy of the Order of May 22, 1995, accurately reflects the Order entered by the Honorable Jack Thompson in open Court on May 22, 1995.

This the 31st day of May, 1995.

"s/Robert E. Fuller, Jr."

Robert E Fuller, Jr.

Attorney for Plaintiff/Appellant

P.O. Box 1121

Goldsboro, NC 27533-1121

(919)735-7496

"s/W. Harrell Everett, Jr."

W. Harrell Everett, Jr.

Attorney for Defendant/Appellee

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